SUPREME COURT, U. S.

FILED

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 921

FIRST NATIONAL BANK OF ELWOOD,
Petitioner,

vs.

RICHARD H. REXRY, as Trustee in Bankruptcy of Cecil L. Slavens, Bankrupt,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

[redacted]
Counsel for Respondent.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Argument	6
Conclusion	11

CITATIONS

Cases: Page

In re Claudon, 73 F. 2d 876 (C. C. A. 7—1934) 8

Dworsky v. Alanjay Bias Binding Corp., 182 F. 2d 803 (C. A. 2—1950) 6

Harney Shoes, Inc. v. Natl. Fabric and Finishing Co., 44 F. 2d 517 (C. C. A. 1—1930) 8

In re Haskell, 73 F. 2d 879 (C. C. A. 7—1934) 8

Hovland v. Farmers State Bank, 10 F. 2d 478 (C. C. A. 8, 1926) 6

International Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866 (1880) 8

In re Shoesmith, 135 Fed. 684 (C. C. A. 7—1905) ... 8

STATUTES

Statutes:

Sec. 60(a)(1) Bankruptcy Act, 64 Stat. 22, 11 U.S.C., Sec. 96 9

Sec. 70(a) Bankruptcy Act, 66 Stat. 429, 11 U.S.C., Sec. 110(a) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ———

FIRST NATIONAL BANK OF ELWOOD,
Petitioner,

vs.

RICHARD F. BIXBY, AS TRUSTEE IN BANKRUPTCY OF CECIL L. SLAVENS, BANKRUPT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Judgment of the District Court are not officially reported. The opinion of the Court of Appeals for the Seventh Circuit is reported in 250 F. 2d 712.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 10, 1957. An Order denying Petition for Rehearing was entered January 8, 1958. The Petition for Writ of Certiorari was filed April 3, 1958. The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED

Whether in a suit by a trustee in bankruptcy to void preferential transfers, the four-month period is to be computed from the date of the filing of an original petition in bankruptcy which alleged acts of bankruptcy without specification, or is the trustee's right to set aside a preferential transfer to be limited to the four-month period preceding the filing of an amended petition which supplied exact specifications of acts of bankruptcy alleged originally.

STATUTES INVOLVED

Respondent accepts Petitioner's citation of statutes involved.

STATEMENT OF THE CASE

The material facts found by the District Court may be summarized as follows:

On April 18, 1956, an involuntary petition in bankruptcy was filed against Cecil L. Skinner (herein referred to sometimes as the "original petition").

It alleged:

"7 (a) Within four months next preceding the filing of this petition, the said Cecil L. Skinner com-

mitted an act of bankruptcy, in that he transferred, while insolvent, portions of his property to one or more creditors, with intent to prefer such creditors over his other creditors.

"(b) That within four months next preceding the filing of this petition, the said Cecil L. Slavens concealed, removed or permitted to be concealed or removed, a part of his property, with intent to hinder, delay or defraud his creditors or any of them, or made or suffered a transfer of part of his property, which transfer was fraudulent under the provisions of Sections 67 or 70 of the Bankruptcy Act."

On April 29, 1954, Slavens filed a motion to dismiss the petition. The Referee in Bankruptcy on June 2, 1954 heard this motion and petitioning creditors' motion for leave to amend their petition, and he entered an order sustaining the bankrupt's contention that the aforesaid language in the petition was defective in not specifically setting forth the acts of bankruptcy alleged. He gave leave to the petitioning creditors to file an amended petition by June 6, 1954, directing the bankrupt to plead thereto by June 16, 1954. The Referee in Bankruptcy further ordered that if no amendment to the petition was filed on or before the 6th day of June, 1954, the aforesaid creditors' petition should be deemed dismissed.

No dismissal order was ever entered, because on June 3, 1954, an amended petition was filed. It alleged, inter alia:

"That within four months next preceding the filing of this petition, . . . Slavens concealed an act of bankruptcy, in that he transferred, while insolvent, portions of his property, by [illegible] to one or more creditors, with intent to prefer such creditors over his other creditors, to-wit: [illegible] on or about February 4, 1954, a chattel mortgage covering

all of the personal property, machinery and equipment in his place of business in Elwood, Indiana, for the benefit of said First National Bank of Elwood, Indiana, a creditor, for or on account of antecedent indebtedness, the effect of which transfer will be to enable such creditor to obtain a greater percentage of its debt than some other creditor of the same class."

On October 28, 1954 Slavens was adjudicated a bankrupt. All proceedings from April through October 28, 1954 continued under the same caption and docket number in the bankruptcy court.

The amended petition set forth in specific detail divers alleged acts of bankruptcy, including that of February 4, 1954, supra. On June 15, 1954, Slavens filed a motion to strike and dismiss the creditors' amended petition. No ruling was made on that motion.

Respondent, as trustee in bankruptcy, commenced an action against the petitioner on January 31, 1956, alleging voidable preferential transfers amounting to Sixty-one Thousand, Four Hundred and Seventy-five Dollars and Fifteen Cents ($61,475.15) made by the bankrupt to the defendant bank during the period January 25 to April 19, 1954.

After filing its answer, the defendant bank moved the district court for summary judgment on the grounds that the transfers alleged by the trustee had not been effected within four months of the filing of the petition in bankruptcy. On July 27, 1956, the district court granted a partial summary judgment in favor of the defendant, holding that June 3, 1954, was the date of the filing of the petition instituting the bankruptcy proceedings and that

preferential transfers made by the bankrupt prior to February 3, 1954, could not be recovered by the trustee. The judgment of July 27, 1956 was incorporated in final judgment, after trial, on March 5, 1957. The district court entered findings of fact, conclusions of law, and a final judgment, in favor of the trustee against the defendant bank in the sum of Eleven Thousand, Five Hundred Nineteen Dollars and Fifty Cents ($11,519.50), for voidable preferential transfers made by the bankrupt on February 4 and 6, 1954, and denying recovery for transfers alleged prior to February 4, 1954.

Upon appeal by the trustee, the court below reversed the judgment of the district court as to the preferences made within four months of the original petition and not set aside, otherwise approving the decision. The court of appeals held that the mere making specific by amendment of the allegation of an act of bankruptcy contained in the original petition was not the statement of a new cause of action; the original petition was the petition which initiated the proceeding; the amended petition related back to the date of the filing of the original petition; and all preferences created within four months of the date of the original petition might be voidable by the trustee.

ARGUMENT

The decision below is correct and not in direct conflict with any other decisions. Moreover, the question presented is limited in its scope and application to suits by trustees in bankruptcy to void preferential transfers.

I.

The two cases upon which the petitioner relies for conflict are readily distinguished from the instant matter. It is claimed that the decision below is in conflict with the decision of the Second Circuit in *Deversky v. Alemyag Bias Binding Corporation*, 182 F. 2d 503 (C. A. 2—1950), and with the decision of the Eighth Circuit in *Hovland v. Farmer's State Bank*, 10 F. 2d 473 (C. C. A. 8—1926). The petitioner, however, has overlooked the fact that neither one of those courts had before it the same question which is presented herein and upon which the Seventh Circuit rendered its opinion.

Aside from the factual distinctions, which the petitioner admits in its brief exists between the instant case and *Deversky* and *Hovland* (p. 6, petitioner's brief), respondent submits that the courts decided different issues. In *Hovland* and *Deversky*, the courts were faced with a motion to dismiss filed by the alleged bankrupt. The trial courts ordered the petitioning creditors to supply the specific details of the act of bankruptcy on which they were relying. In *Hovland* and *Deversky*, the petitioning creditors failed to supply specifications which would have al-

lowed a relation back, and in order to protect the alleged bankrupt the court dismissed the petition. Therefore, both cases were lawsuits without final judgments.

In the bankruptcy proceedings from which the instant action stems, the petitioning creditors, after [illegible] agreed to do so, acquired [illegible] bankrupt. No dismissal was [illegible] with the consent [illegible] —that Court [illegible] over taken from [illegible] tion, a trustee was elected [illegible] This trustee instituted the within cause of action to recover voidable preferences for the benefit of the estate.

The differences are obvious. In *Hoeland* and *Dworsky* the courts were protecting the rights of an alleged bankrupt in cases which did not go to final judgment. In the instant matter, the Seventh Circuit was considering a preferential transfer action brought by a duly elected trustee in bankruptcy, whose rights and powers had been questioned—rights and powers which stemmed from a bankruptcy case which had ended in a final judgment. The rights of alleged bankrupts as of petitioning creditors were not at issue.

As aptly expressed by the Seventh Circuit, below, the problem is [illegible] the time of petitioning had the court, pursuant to [illegible] of a special dismissal [illegible] supply [illegible] Chapter, that a new case of action was filed by the

first time in the amended petition. In fact, the trial court in the bankruptcy matter allowed the filing of the amended petition and the subsequent entry of an adjudication.

The decision of the Seventh Circuit herein is well supported by prior decisions. *Boyd Chandler*, 73 F. 2d 876 (C. C. A. 7—1935); *McCoy v. Miller, Inc. v. Nat. Fabric & Fibre* [illegible] (C. C. A. 1—1935); *In re Kimball*, [illegible] (C. C. A. 1—1935); *In re Blakemore*, 28 Fed. 656 (C. C. A. 7—1936).

The decision of the court below, rather than being in conflict with prior decisions, is in fact in full accord with the theory used by this court in *International Bank v. Sherman* (1939), 101 F. 2d 405, 88 L. Ed. 865. In the foregoing case, an involuntary petition was filed on February 23, 1878. On the 22nd day of April, an amendment was allowed to set forth an additional act of bankruptcy, upon which an adjudication was made. The bankrupt transferred certain of his property between the date of the original petition and the date of the amendment to the petition. The transferee asserted title against the trustee's title as of the date of the amendment, the date on which the amendment to the petition was made. This court held for the trustee and that the trustee's title to property vested as of the date of the original petition in February. In the *Sherman* case, the court said as follows, at page 406:

[illegible]

"The assignment relates back to the commencement of the proceedings against him by the filing of the petition or [illegible] adjudication, and the title of the assignee to all the property and effects of the bankrupt [illegible] as of that date."

[illegible] the International Bank case, supra, the whole [illegible] provisions [illegible] of the [illegible] pro-vided in [illegible] the same phrase "[illegible] this act, [illegible] be had. It is clear that it is one date and one only which controls the rights of the trustee after adjudication. Under the *International Bank* case, this date must be the date of the original petition.

II.

The petitioner states that the question presented is of importance in the administration of the Federal Bankruptcy Laws. It is [illegible] that the question [illegible] to arise by reason of the [illegible] provisions of the Bankruptcy Act, and if the decision there is to be [illegible] in its effect.

The reasons [illegible] are supported by the petition for the writ [illegible] the petitioner [illegible] of the case, and [illegible] is respectfully

the bankruptcy action or in the trial court herein, was ever offered to the effect that after-discovered facts had been used by the petitioning creditors herein.

[redacted]

CONCLUSION

For the foregoing reasons and authorities cited, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES B. FREEDMAN,
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[redacted]

ALAN I. HOFFMAN,
Counsel for Respondent.